No. 93-656

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

GAS UTILITIES COMPANY OF ALABAMA, INC.,
Petitioner,
VS.
SOUTHERN NATURAL GAS COMPANY and
ALABAMA GAS CORPORATION,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENT SOUTHERN NATURAL GAS COMPANY IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioner, a putative potential market entrant, can establish antitrust injury where it was wholly unprepared to enter the targeted market due to its failure to secure financing, consummate contracts, and take other affirmative steps necessary to conduct business therein?

2. Whether Petitioner can establish a claim of unlawful concerted action under Section 1 of the Sherman Act where it has failed to proffer evidence tending to exclude the possibility that Respondents acted independently?

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BRIEF FOR RESPONDENT SOUTHERN NATURAL GAS COMPANY IN OPPOSITION

I. STATEMENT OF THE CASE

This case involves the routine application below of Supreme Court and Eleventh Circuit authority. Petitioner Gas Utilities Company of Alabama, Inc. ("Gas Utilities" or "Petitioner") invokes none of the "special and important reasons" set forth by this Court that would justify review of this case. The Petition for a Writ of Certiorari should be denied.

Respondent Southern Natural Gas Company ("Southern") operates a federally-regulated interstate pipeline through which it delivers natural gas to state-regulated local distribution companies ("LDCs"), including Respondent Alabama Gas Corporation

("Alagasco"). The LDCs, in turn, distribute gas to industrial, commercial and residential customers.

In 1989, two individuals formed Gas Utilities to carry out a scheme to cherry-pick Alagasco's high volume industrial customers. They planned to build pipelines directly connecting these industrial customers to an interstate pipeline, believing they could undercut Alagasco's prices.

Gas Utilities' assumption that it could undercut Alagasco's rates proved untrue. Alagasco responded to Gas Utilities' solicitation of Alagasco's industrial customers by providing them with competitive rate discounts.

Meanwhile, Gas Utilities made requests to Southern to construct new connections to Southern's interstate pipeline. Southern, applying an existing policy, denied Gas Utilities' requests because all potential customers Gas Utilities identified already could be served through existing Southern connections to its LDC.

Petitioner then commenced this action, claiming it was a viable company seeking to build alternative pipelines to Alagasco's industrial customers, which had been foreclosed from entering the market by a conspiracy between Alagasco and its supplier, Southern. Discovery revealed a far different story. Gas Utilities turned out to be little more than two people with a shell corporation and a telephone, and their conspiracy theory evaporated into thin air.

In a routine application of Supreme Court and Eleventh Circuit authority, the district court properly granted summary judgment against Petitioner on its antitrust claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, because it had failed to establish antitrust injury and an unlawful conspiracy. In a per curiam decision, the Eleventh Circuit affirmed, holding that Petitioner lacked antitrust standing because it "failed to demonstrate that it was prepared to enter the market. * * * [Gas Utilities] did not establish that [it] had *secured* financing or *consummated* its contracts." Eleventh Circuit Opinion, Gas Utilities' Petition for Writ of Cert. at 5ºa ("Pet.") (emphasis in original). The court also adopted in its entirety the district court's decision rejecting Petitioner's Sherman Act claims on the merits,

concluding that the claims did not "deserve[ ] * * * comment." *Id.*

Petitioner now seeks to resurrect its Section 1 claim in this Court.[1] But, as demonstrated below, Gas Utilities' Petition does not satisfy this Court's standards for granting a Writ of Certiorari and therefore should be denied.

II. REASONS FOR DENYING THE WRIT

Petitioner invokes none of the "special and important reasons" set forth in Rule 10 of this Court to justify review on Writ of Certiorari. Petitioner does not, and cannot, assert that the decisions below give rise to an intercircuit conflict, deviate from settled Supreme Court precedent, or otherwise depart from the usual course of judicial proceedings. Rather, Petitioner simply disagrees with the conclusions reached by the district court, and then affirmed by the Eleventh Circuit, in routinely applying well-established legal standards to uncontroverted facts in the record.

The Eleventh Circuit held that Petitioner could not establish antitrust injury arising from alleged foreclosure from a prospective market that it was unprepared to enter. Petitioner does not challenge the well-established legal standard for evaluating "preparedness" that the courts applied below. Petitioner merely contends that the courts should have reached a contrary result in applying that standard to the factual record.

The Eleventh Circuit also held that, irrespective of the issue of antitrust injury, Petitioner failed to provide direct or circumstantial evidence of unlawful conspiracy necessary to establish a claim under Section 1 of the Sherman Act. Again, Petitioner does not contend that the reliance of the courts below on the Supreme Court's legal standards concerning antitrust conspiracy was error. Petitioner merely disputes the lower courts' conclusion in apply-

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[1]The Eleventh Circuit also affirmed the district court's granting of summary judgment against Petitioner on its claims under Section 2 of the Sherman Act, 15 U.S.C. § 2, and its state law tortious interference claims. Pet. at 60a-61a. Petitioner raises none of those claims before this Court.

ing those standards that the uncontroverted facts in the record do not "tend to exclude the possibility" that Respondents acted independently.

In sum, Petitioner has proffered no justification for granting its Petition. In any event, the decision below is proper. Accordingly, the Petition should be denied.

III. THE DECISION BELOW WAS PROPER AND CONSISTENT WITH PRECEDENTS OF THIS COURT AND OTHER CIRCUITS

A. The Eleventh Circuit Properly Held That Petitioner Failed To Establish The Antitrust Injury Essential To Its Antitrust Claims

A plaintiff lacks standing to bring an antitrust action unless it has "suffered 'antitrust injury' " to its "business or property." 15 U.S.C. § 15(a); *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983). As the Eleventh Circuit concluded, where a frustrated prospective market entrant such as Gas Utilities attempts to demonstrate "antitrust injury," the "law clearly requires a showing of an intention and preparedness to enter the business to give a plaintiff a cause of action for being foreclosed from the market." Pet. at 59a (citing *Cable Holdings of Ga. Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1562 (11th Cir. 1987)). Because the uncontroverted facts in the record below "failed to demonstrate that [Gas Utilities] was prepared to enter the market," the Eleventh Circuit properly affirmed the district court's grant of summary judgment against Petitioner on the ground that it had not established antitrust standing. *Id.*

In the Eleventh Circuit, to establish "preparedness to enter the business," a plaintiff must demonstrate "four elements":

> [1] *the ability of plaintiff to finance* the business and to purchase the necessary facilities and equipment; [2] the *consummation of contracts* by the plaintiff; [3] *affirmative action* by plaintiff to enter the business; [4] the *background and experience* of plaintiff in the prospective business.

Hayes v. Solomon, 597 F.2d 958, 973 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980) (emphasis added) (quoting *Martin v. Phillips Petroleum Co.*, 365 F.2d 629, 633-34 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966)).[2]

Petitioner failed to establish these "preparedness" elements below. As the district court concluded, Petitioner's inadequate efforts at " 'preparation' can best be styled as an idea coupled with a hope, plus some minimal investigation to explore potential, and some indication of interest from potential customers. There is no substantial evidence of tangible preparation." Pet. at 47a-48a. Accordingly, the Eleventh Circuit properly affirmed summary judgment in favor of Respondents.

Gas Utilities' Lack Of Financing. The courts below properly concluded that Gas Utilities' did not have "the requisite financial preparedness to have suffered antitrust injury." Pet. at 48a. Indeed, although entry into the gas distribution business was concededly an expensive proposition, Gas Utilities had no working capital, loans, lines of credit, or financing commitment from any third party.[3]

Petitioner asserted below that it did have a financing commitment from Messrs. Herbst and Holmes — two business associates of Gas Utilities' principal, Dan Tutcher. But in their depositions, Herbst and Holmes stated that they would have committed to finance Gas Utilities only if they had been presented "with a definit[ive] project" that met their "economic criteria." Pet. at

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[2]Neither Petitioner (Pet. at 17), nor any of the other circuits, have taken issue with this legal standard for evaluating "preparedness." To the contrary, in addition to the Fifth and Eleventh Circuits, courts in at least five other circuits have explicitly adopted it. *See, e.g., Indium Corp. of Am. v. Semi-Alloys, Inc.*, 611 F. Supp. 379 (D.C.N.Y. 1985), *aff'd*, 781 F.2d 879 (Fed. Cir. 1985), *cert. denied*, 479 U.S. 820 (1986); *Bubar v. Ampco Foods, Inc.*, 752 F.2d 445 (9th Cir.), *cert. denied*, 472 U.S. 1018 (1985); *Curtis v. Campbell-Taggart, Inc.*, 687 F.2d 336 (10th Cir. 1982); *Practice Perfect, Inc. v. Hamilton County Pharmaceutical Assoc.*, 732 F. Supp. 798 (S.D. Ohio 1989); *Denver Petroleum Corp. v. Shell Oil Co.*, 306 F. Supp. 289 (D. Colo. 1969).

[3]Summary Exhibit B, Lodging at 1-11.

41a-42a. The record is uncontroverted that Gas Utilities never presented these men with any project, much less received in return a definite financing commitment.[4] Moreover, Herbst and Holmes were not even considering investing their own capital. Rather, they admitted they would have sought financing for Gas Utilities by applying to banks; but it is undisputed that they "never contacted any banks regarding financing" for Gas Utilities.[5]

Petitioner was left to assert, by way of an after-the-fact affidavit, that Gas Utilities' principal, Dan Tutcher, "could have" personally financed Gas Utilities if necessary. But as the courts below recognized, there was no evidence to support Petitioner's belated contentions that Tutcher was even capable of, much less *committed to*, providing such financing.[6]

In sum, the Eleventh Circuit properly concluded that the record simply "did not establish that Gas Utilities had secured financing." Pet. at 59a. As the court recognized, the "mere possibility of financing being available in the abstract is not enough. Showing that someone somehow could possibly obtain financing is not the same as showing that plaintiffs themselves were able and prepared to do so." *Id.* (quoting *Hayes*, 597 F.2d at 975).

Gas Utilities' Failure To Consummate Contracts. The courts below also properly concluded that the record "did not establish that Gas Utilities had * * * consummated its contracts." Pet. at 59a. Indeed, Petitioner conceded that it failed to execute any of the contracts necessary to enter the business of delivering gas to industrial end-users — it had no financing or gas supply contracts,

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[4]Pet. at 41a-42a; Summary Exhibit B, Lodging at 5-12.

[5]Pet. at 48a; Summary Exhibit B, Lodging at 6-9.

[6]Indeed, Tutcher "never stated this in his deposition nor provided evidence of how he would have accomplished it." Pet. at 11a; Summary Exhibit B, Lodging at 2-11. To the contrary, in a series of documents contemporaneously prepared by Tutcher, he identified Petitioner's only prospective sources of financing to be Herbst, Holmes, and their banks. *Id.*

and no contracts to obtain rights-of-way, engineering services, surveying and construction services, or even the necessary pipe and meters.[7]

Petitioner now asserts, however, that it did consummate "fully enforceable" gas transportation contracts with two prospective customers. Pet. at 21.[8] But as Respondents demonstrated below, both of these supposed "agreements" were wholly illusory on a variety of grounds, and were thus invalid as a matter of law. *See* Pet. at 12a, 28a, 48a, 59a. *See, e.g., Martin*, 365 F.2d at 634 ("[o]nly a valid contract would be property subject to protection of" the antitrust laws).

Thus, Petitioner is left to rely on its preliminary solicitation of other potential customers. But as the courts below concluded, a "showing that someone may be interested in entering into a contract if the price is right is [simply] not the same as having an enforceable contract." Pet. at 59a.

Gas Utilities' Failure To Take Affirmative Action. The uncontroverted facts also demonstrated that Gas Utilities failed to take the affirmative actions necessary to enter the natural gas distribution market. For example, Petitioner admits it made no substantial efforts to prepare for and carry out construction of its proposed gas distribution facilities — it acquired no rights-of-way, performed no land surveys, employed no engineers or attorneys, contacted no intervening landowners, contracted with no gas suppliers, acquired no financing, developed no engineering plans, and failed to negotiate any proposed pipeline connections with

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[7]Summary Exhibit B, Lodging at 2-11.

[8]Even if true, this assertion would be insufficient to satisfy the contract consummation element of the "preparedness" standard. *See, e.g., Practice Perfect, Inc.*, 732 F. Supp. at 803 (summary judgment granted against plaintiffs who demonstrated contracts with only four of over 300 solicited customers, because they "needed at least five [customer contracts] to just reach the break even point for starting their business"). Here, there is no evidence to suggest that Petitioner's alleged "agreements" with just two of the more than 60 customers it purportedly contacted would have provided "a substantial prospect of creating a successful business." *Id.*

prospective customers (*e.g.*, pipe route, pipe size, and meter location).[9] Moreover, Petitioner concedes that it took no steps to obtain, or even apply for, the necessary governmental permits or approvals for entry into the gas distribution business.[10]

Petitioner now resurrects the same tired list presented below of actions that it purportedly did take. Pet. at 18-20. But Respondents demonstrated that, upon closer examination, this list is revealed to be a series of gross exaggerations.[11] In any event, as the Eleventh Circuit properly concluded, Gas Utilities' "activities were merely preliminary steps taken in anticipation of preparing to enter the market." Pet. at 59a. Such "[i]nquiry into procedures is insufficient to establish preparedness. The party must take some affirmative step to enter the business." Pet. at 60a.

Petitioner complains that there was no point in actually "building a pipeline" since Southern had rejected its requests for direct connections to Southern's interstate pipeline. Pet. at 21. But Petitioner misses the point. Irrespective of the defendant's alleg-

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[9]Major Aff., Lodging at 31-33; Summary Exhibit B, Lodging at 2-11, 14, 18-22.

[10]The failure to *obtain* necessary governmental and regulatory approvals renders a plaintiff unprepared to enter the relevant business. *See, e.g., Cable Holdings*, 825 F.2d at 1562 (cable company that failed to apply for FCC approval and obtain necessary permits was unprepared to expand into new service area). Here, Gas Utilities never even determined which regulatory body it would be subject to regulation under, and admits that this issue remained an unresolved "gray area" that it simply "didn't take * * * into account." Tutcher TR, Lodging at 102-04, 118, 119-21, 138-41; Holmes TR, Lodging at 68-69. Thus, Gas Utilities was ignorant as to what its regulated rate of return might be, despite conceding that its threshold for market entry was "an annual 20 percent return on investment over the life of the investment." Levrier TR, Lodging at 79.

[11]For example, the "maps and geographic surveys" Gas Utilities supposedly prepared (Pet. at 20), turned out to be little more than "Xs" marked on printed maps, not of Southern's interstate pipeline route, but of the route of another company's pipeline. Tutcher TR, Lodging at 144A-144B.

edly unlawful conduct, a plaintiff is required to take those steps toward preparedness still within its power.[12] As the district court observed, Petitioner "cannot simply use Southern's denial [of its direct connection requests] to create an inference of antitrust injury to business or property." Pet. at 49a.

In sum, the Eleventh Circuit properly held that Petitioner "failed to demonstrate that it was prepared to enter the market." Pet. at 59a. Accordingly, Petitioner lacked antitrust injury and standing.

B. The Eleventh Circuit Properly Held That Petitioner Failed To Establish The Unlawful Conspiracy Essential To Its Sherman Act Section 1 Claim

The Eleventh Circuit adopted, without comment, the district court's decision rejecting Petitioner's Sherman Act Section 1 claim on the merits. Pet. at 60a-61a. Petitioner does not assert that the decision below conflicts with decisions of this Court or other circuits, or that it constitutes a departure from the "accepted and usual course of judicial proceedings." Rather, Petitioner repeats to this Court the same litany of speculative contentions that the courts rejected below. In short, the Petition provides no justification for this Court to review the Eleventh Circuit's rejection of Petitioner's Sherman Act Section 1 claim.

1. There Is No Dispute About The Law

All three parties to this action, the trial and appellate courts, and all other federal jurisdictions, agree on the relevant standards here: to establish an illegal agreement under Section 1, Petitioner must demonstrate a "unity of purpose" or "meeting of the minds" between Southern and Alagasco. Pet. at 22, *citing American*

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[12] *See, e.g., Cable Holdings, Inc.*, 825 F.2d at 1560-61 (plaintiff unprepared despite defendant inhibiting the stringing of cable and instituting sham lawsuit); *Martin*, 365 F.2d at 632 (plaintiff unprepared despite defendant's usurping of its bank financing); *Jayco Sys., Inc. v. Savin Business Machs. Corp.*, 777 F.2d 306, 314 (5th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986) (plaintiff unprepared despite defendant's refusal to supply machines needed for contract bidding).

Tobacco Co. v. United States, 328 U.S. 781 (1946).[13] Petitioner must do so by presenting direct or circumstantial evidence of an unlawful agreement. Pet. at 27, *citing Key Enters. of Del., Inc. v. Venice Hosp.*, 919 F.2d 1550, 1563 (11th Cir. 1990), [*vacated*, 979 F.2d 806 (11th Cir. 1992)], *quoting United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 252-54 (1940). Moreover, such evidence, whether direct or circumstantial, must "tend[ ] to exclude the possibility" that Southern and Alagasco acted independently. Pet. at 23, quoting *Monsanto*, 465 U.S. at 764, *and Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986).

This Court has sharply "limit[ed] the range of permissible inferences" to be drawn from circumstantial evidence in the context of Section 1 claims. *Matsushita*, 475 U.S. at 588 (1986). Thus, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* Courts are especially reluctant to infer from inconclusive evidence that a conspiracy exists where the defendants have proffered legitimate business justifications for their actions.[14]

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[13]Indeed, at the heart of Section 1 is the basic distinction between concerted and unilateral conduct. *Fisher v. City of Berkeley*, 475 U.S. 260 (1986); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

[14]*See, e.g., Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1456 (11th Cir. 1991) (hospital refused to deal with anesthesiologist because it believed it would impair hospital's efficiency); *Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575, 1580 (11th Cir. 1988) (supplier refused to deal with distributor because it had a policy against dealing with competitors of existing distributors). Other circuits concur. *See, e.g., The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1159-60 (9th Cir. 1988) (refusal to deal justified by supplier's desire to have a consistent marketing strategy); *Bailey's, Inc. v. Windsor Am., Inc.*, 948 F.2d 1018 (6th Cir. 1991) (supplier's decision to terminate one distributor in order to retain another could not give rise to inference of conspiracy); *National Marine Elecs. Distribs., Inc. v. Raytheon Co.*, 778 F.2d 190 (4th Cir. 1985) (same); *Joe Regueira v. American Distilling Co.*,

(footnote continued)

This Court and the Eleventh Circuit have applied these standards in the supplier-distributor context in legions of cases. Both courts have repeatedly held that a supplier (like Southern) may refuse to deal with a distributor (like Gas Utilities) so long as it does not do so pursuant to an unlawful agreement with a third party (like Alagasco).[15] Other circuits agree.[16]

2. There Is No Dispute About The Relevant Facts

The facts relevant to Petitioner's Section 1 claim also are uncontroverted. During 1988 and 1989, Southern developed a policy governing requests for direct connections to its interstate

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642 F.2d 826 (5th Cir. 1981) (supplier refused to deal because of distributor's bad credit history).

[15]In *Monsanto*, for instance, this Court recognized that a supplier could lawfully refuse to deal with one distributor in response to complaints from a second distributor. 465 U.S. at 1470. Similarly, in *Dunnivant*, the Eleventh Circuit, *citing* both *Monsanto* and *Matsushita*, concluded that a supplier could do so as long as there was no meeting of the minds between the complaining distributor and the supplier with respect to the excluded distributor. 851 F.2d at 1580. *Compare, e.g., Winn v. Edna Hibel Corp.*, 858 F.2d 1517 (11th Cir. 1988) (no illegal agreement between a supplier and a distributor inferrable absent evidence of a complaint from a distributor, reassuring response from the supplier, and action by the supplier) *with Helicopter Support Sys., Inc. v. Hughes Helicopter, Inc.*, 818 F.2d 1530 (11th Cir. 1987) (an agreement inferred where a meeting of the minds was evidenced by an exchange of complaints and reassurances).

[16]*See, e.g., Bailey's*, 948 F.2d 1018 (termination of a price cutting dealer, even if done at the request of another dealer, was a unilateral action by the supplier motivated by its own economic interest); *The Jeanery*, 849 F.2d 1148 (termination of one dealer in response to complaints from another dealer did not give rise to inference of conspiracy); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987) (no conspiracy inferred from termination in response to dealer complaints); *Garment Dist., Inc. v. Belk Store Servs., Inc.*, 799 F.2d 905 (4th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988) (no conspiracy could be inferred where supplier terminated one distributor to prevent threatened loss of another distributor).

pipeline. Southern did not discuss that policy with any of its LDC customers, including Alagasco. In 1989, Gas Utilities made three separate requests for a direct connection to Southern's interstate pipeline. Without discussing Gas Utilities or its requests with Alagasco or any other LDC, Southern applied its direct connection policy in denying each of Gas Utilities' requests.[17] Meanwhile, Alagasco reacted to Gas Utilities in a manner wholly inconsistent with an alleged conspiracy — by slashing its prices to those of its customers that Gas Utilities had approached. Pet. at 8a-10a, 49a.

Petitioner does not dispute these facts. Rather, Petitioner simply repeats its list of contentions, unsuccessfully raised below, that supposedly point to a "conspiracy." Pet. at 25-29.

3. The Uncontroverted Evidence Does Not "Tend To Exclude The Possibility" That Respondents Acted Independently

Upon review, the Eleventh Circuit summarily affirmed the district court's conclusion that, rather than "tend[ing] to exclude the possibility" of independent action, the uncontroverted *evidence* concerning each of Petitioner's "conspiracy" contentions actually shows that Southern and Alagasco reacted to Gas Utilities' actions by pursuing their own independent interests. Pet. at 30a:

- Petitioner suggests that Southern agreed not to solicit Alagasco's industrial customers in 1985. (Pet. at 25). But the *evidence* is uncontroverted that Southern has followed that marketing strategy unilaterally for more than twenty years. Pet. at 50a.

- Petitioner complains that since 1985 Alagasco has not sought more of its gas from Transcontinental Gas Pipe Line Corporation

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[17]Major Aff., Lodging at 30-31; Hawkins TR, Lodging at 44-48; Wright TR, Lodging at 166-67; Major TR, Lodging at 87-88, 89-90, 91; Matthews TR, Lodging at 93-95, 96-98, 99, 100; Kuehn TR, Lodging at 71-76; Gardner TR, Lodging at 35-37, 38-42; Warren TR, Lodging at 146-58, 159-62, 163-64; Limbaugh TR, Lodging at 82-85; Wright TR, Lodging at 166-67; Tutcher Depo. Exhibit 115, Lodging at 168-86; Tutcher Depo. Exhibit 116, Lodging at 187-207.

instead of from Southern. (Pet. at 13-14). But the *evidence* is uncontroverted that Alagasco could not feasibly do so because of the physical limitations of its pipeline system. Pet. at 50a.

• Petitioner complains that Southern rejected Gas Utilities' request for a direct connection in Tuscaloosa, Alabama even though, according to Petitioner, that connection might have resulted in some "incremental load" for Southern to one potential industrial customer. (Pet. at 28). But the *evidence* is uncontroverted that Southern's decision was justified by its desire to maximize its system-wide revenue, and compelled by Southern's direct connection policy, which predated Gas Utilities' requests and had been applied to requests from many other companies. Pet. at 50a.

• Petitioner asserts that Southern issued its subsequent direct connection policy in February 1991 in "response to" comments made by Alagasco's President. (Pet. at 29). But the *evidence* is uncontroverted that the policy was issued in response to concerns expressed by the North Carolina Utilities Commission. Gardner TR, Lodging at 42A-42D, 42E-42F.

• Finally, Petitioner points to the 1988 "settlement" between Southern and all of its LDC customers. (Pet. at 26-27). But the *evidence* is uncontroverted that the settlement was encouraged, scrutinized and expressly approved by the Federal Energy Regulatory Commission; it is therefore is immune from attack under Section 1. Pet. at 50a-51a.

IV. CONCLUSION

The Eleventh Circuit's affirmance of summary judgment in favor of Respondents was proper in all respects. Moreover, it raises no intercircuit conflict, and represents no "departure from the accepted and usual course of judicial proceedings." Accordingly, Gas Utilities' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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